COLE INDUSTRIES, INC.

IBLA 83-477 Decided August 31, 1984

Appeal from decisions of Nevada State Office, Bureau of Land Management, requesting purchase money and reappraising annual rental charges for communication site right-of-way N-7884.

Set aside in part and remanded, affirmed in part.

1. Administrative Procedure: Hearings -- Appraisals -- Communication Sites -- Hearings -- Rights-of-Way: Act of March 4, 1911 -- Rules of Practice: Hearings

   Under 43 CFR 2802.1-7(e) (1974), which provided that charges for use and occupancy of a right-of-way may be revised after notice and an opportunity for hearing, it is improper to increase such charges without following the prescribed procedure where the right-of-way was issued pursuant to the Act of March 4, 1911, as amended, 43 U.S.C. § 961 (1976), and has not been conformed to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982).

2. Appraisals -- Communication Sites -- Federal Land Policy and Management Act of 1976: Sales -- Public Lands: Appraisals -- Public Sales: Appraisals -- Rights-of-Way: Act of March 4, 1911

   Where BLM appraises a parcel of land subject to a communication site right-of-way for direct sale to the holder of the grant pursuant to sec. 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1982), it is proper for BLM to appraise the parcel as if unencumbered, since the right-of-way is extinguished upon the right-of-way holder's acquisition of the fee title.

APPEARANCES: Jerome E. Eggers, Esq., San Diego, California, for appellant; Thomas J. Kelly, Esq., Chicago, Illinois, for sublessee, KLUC Broadcasting Company.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Cole Industries, Inc., has appealed from two decisions of the Nevada State Office, Bureau of Land Management (BLM), dated December 27, 1982, and

February 25, 1983, respectively, requesting purchase money and reappraising the annual rental charges for its communication site right-of-way N-7884.

On September 30, 1974, a 50-year communication site right-of-way was granted to Nevada Broadcast, Inc. (Nevada), pursuant to the Act of March 4, 1911, as amended, 43 U.S.C. § 961 (1976), for the purpose of constructing a radio broadcasting station tower and associated facilities. 1/ The right-of-way encompasses 1.11 acres of land situated in lots 22 and 23, T. 21 S., R. 60 E., Mount Diablo meridian, Clark County, Nevada. The original rental was set at "$1,620.00 paid for the first 10-year period, subject to review and in accordance with 43 CFR 2802.1-7(e)." By decision dated July 27, 1977, BLM approved assignment of the right-of-way from Nevada to appellant, stating that the "assignee is bound by all the terms and conditions of the original grant." 2/

By letter dated July 21, 1981, BLM informed appellant that it would offer 10.89 acres of public land in the Las Vegas Valley, including right-of-way N-7884, for sale in accordance with the Act of December 23, 1980, P.L. 96-586, 94 Stat. 3381 (1980). BLM stated that it would offer the area to appellant and KLUC at "current estimated fair market value." In the alternative, BLM stated, appellant and KLUC could continue under the right-of-way grant, subject to "periodic rental review." On April 30, 1982, BLM published notice in the Federal Register of the proposed offer to sell certain public land, including right-of-way N-7884, to the "authorized user or users." 47 FR 18680 (Apr. 30, 1982).

In its December 1982 decision, BLM requested purchase money for the 10.89-acre parcel in the amount of $318,000, the "appraised fair market value," for direct sale to appellant pursuant to section 203 of FLPMA, 43 U.S.C. § 1713 (1982). In its February 1983 decision, BLM notified appellant that the right-of-way had been reappraised, resulting in an annual rental charge of $39,275. BLM stated that the rental would be due on September 30, 1984.

[1] In its statement of reasons for appeal, appellant contends that it is entitled to notice and an opportunity for a hearing prior to the imposition of a reappraised annual rental charge, in accordance with 43 CFR 2802.1-7(e) (1974). We agree. the applicable regulation, 43 CFR 2802.1-7(e) (1974), which was in effect at the time right-of-way N-7884 was issued and was incorporated in the grant, provided:

> At any time not less than five years after either the grant of the permit, right-of-way, or easement or the last revision of charges thereunder, the authorized officer, after reasonable

1/ Effective Oct. 21, 1976, this Act was repealed by section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, 90 Stat. 2793 (1976), subject to valid existing rights.
2/ Appellant states in its statement of reasons that "[o]n or about September 20, 1978," it leased space on its AM transmitter to KLUC Broadcasting Company (KLUC) (Statement of Reasons at 2), and that KLUC also obtained a coextensive BLM right-of-way (N-19997) for the purpose of constructing an FM transmitter at the site.

> notice and opportunity for hearing, may review such charges and impose such new charges as may be reasonable and proper commencing with the ensuing charge year. [Emphasis added.]

We have consistently held that where a right-of-way has been issued pursuant to the Act of March 4, 1911, supra, and has not been conformed to Title V of FLPMA, 3/ BLM must afford the right-of-way holder notice and an opportunity for a hearing prior to the imposition of reappraised annual rental charges. Mountain States Telephone & Telegraph Co., 64 IBLA 164 (1982), and cases cited therein. The requirement for a hearing may be satisfied at the BLM state office level in accordance with the procedural parameters outlined in Circle L, Inc., 36 IBLA 260 (1978). Mountain States Telephone & Telegraph Co., supra.

Appellant has also raised a number of questions regarding the adequacy of BLM's reappraisal of the annual rental charge for its right-of-way. There is nothing in the record to evidence that the right-of-way was reappraised. The appraisal report relied on by BLM to determine the annual rental value was the same appraisal report prepared to estimate the fee value of the 10.89-acre parcel. It appears that the annual rental quoted by BLM represents annual rental for 10.89 acres as opposed to the 1.11 acres granted in right-of-way N-7884. Prior to proceeding to a hearing in this matter, BLM should prepare an appraisal of the 1.11 acres described in the right-of-way. BLM should then notify appellant of any proposed changes in the rental as a result of reappraisal 4/ and provide an opportunity for a hearing, if requested, as stated above.

[2] Appellant also contends that the purchase money requested in the December 1982 BLM decision was "excessive" (Statement of Reasons at 7). 5/

3/ Section 509(a) of FLPMA, 43 U.S.C. § 1769(a) (1982), provides that a pre-existing right-of-way may be relinquished by the holder thereof and a FLPMA right-of-way issued "in its stead." 43 CFR 2803.1-2(d), applicable to FLPMA rights-of-way, only provides for "[r]easonable notice" prior to imposition of reappraised annual rental charges.

4/ We reject appellant's argument that BLM is estopped from increasing the annual rental. The effective annual rental charge for the 10-year period from 1974 to 1984 was $162. There is no evidence in the record that any BLM employee represented to appellant that the annual rental charge would continue to be $162, adjusted for normal inflation, in ensuing years. The applicable regulation, 43 CFR 2802.1-7(e), only provided for the imposition of "such new charges [based on fair market value] as may be reasonable and proper." Accordingly, we conclude that appellant has not relied on any "conduct" of BLM to his detriment, which the court in United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970), held to be an essential predicate to the imposition of the doctrine of equitable estoppel. Moreover, we can find neither an "affirmative misrepresentation" nor an "affirmative concealment of a material fact" required to establish estoppel. United States v. Ruby Co., 588 F.2d 697, 703-04 (9th Cir. 1978); see Schweiker v. Hansen, 450 U.S. 785 (1981).

5/ The requested purchase money was based on the appraised fair market value of the 10.89-acre parcel, which then formed the basis for determination of

Appellant states that "[r]esidentially zoned, unencumbered" property "in the vicinity" of its communication site "is being listed for sale for approximately $30,000 per acre." Id. at 7. However, appellant concludes that, in valuing its communication site, BLM must take into account the "negative effect on fee value" of the right-of-way. Id. at 8. Appellant states that "the transmitter, guy wires, ground antenna array and related outbuildings cover the 10.89 acres in a manner that renders the parcel useless except as a communication site." Id. at 7. It concludes, "that until the right of way expires, the fee interest amounts to a reverter which becomes valuable only near the end of the right of way term." Id. at 7.

BLM made a determination to offer the parcel for sale to appellant because it was the holder of a right-of-way grant to which the parcel is subject. When public land subject to a right-of-way is transferred out of Federal ownership, BLM has some discretion as to whether it will maintain its responsibilities as grantor. The applicable regulation, 43 CFR 2803.5(b), provides:

> Where a right-of-way grant or temporary use permit traverses Federal lands that are transferred out of Federal ownership, the transfer of the lands shall, at the discretion of the authorized officer, either include an assignment of the right-of-way, or be made subject to the right-of-way or the United States may reserve unto itself the lands encumbered by the right-of-way.

The BLM appraisal did not consider the effects of the right-of-way. Apparently, BLM contemplates transferring the parcel with an assignment of the right-of-way to appellant. When BLM transfers the land in fee and assigns its interest in the right-of-way to appellant, so that appellant owns both interests, the right-of-way would be extinguished. See State of Alaska, 58 IBLA 110 (1983). It is well established that where ownership of the dominant and servient estates unite under a single ownership, the two estates are merged and one estate will exist. 2 Thompson on Real Property § 449 (1961 Replacement). The doctrine of merger is explained in 3 Tiffany, Real Property, § 822, at 377-78 (3rd. ed.):

> An easement is ordinarily extinguished if one person acquires an estate in fee simple in possession in both the dominant and servient tenements. By reason of the perpetual right of possession of the tenement which was previously subject to the easement, such person and his heirs can make any use whatsoever thereof, and the inferior right of easement, its utility having thus disappeared, is swallowed up in the superior right of possession.

Thus, appellant's right-of-way would no longer be outstanding and its ownership of the tract would be complete. Accordingly, it was proper for BLM to appraise the parcel as if unencumbered.

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fn. 5 (continued)
the reappraised annual rental charge using a rate of return of 13 percent. See Memorandum to Chief, Branch of Appraisal, BLM, from Kenneth W. Thompson, Appraiser, dated Dec. 16, 1982.

On September 28, 1982, Kenneth W. Thompson, a BLM real estate appraiser, prepared an appraisal report which assessed the fair market value 6/ of the 10.89-acre parcel. The appraisal used a market data approach, relying on a "direct comparison with other similar properties which have been conveyed on the open market," with adjustments made for various factors of value (Appraisal Report at 10). The appraiser examined 15 to 20 transactions and selected 4 to establish a value range. The highest and best use of the 10.89-acre parcel was considered to be, "if unencumbered, * * * investment for future residential homesite development." Id. at 9. The determination of highest and best use was based on "neighborhood trends and the uses of adjacent lands." Id. The appraiser concluded that the fair market value was "$36,500 per gross acre." Id. at 18. However, in his December 1982 memorandum (see footnote 4), the appraiser stated that he had reinspected the subject property and determined that the original fair market value should be discounted 20 percent, resulting in a per acre value of $29,200. This per acre value is comparable to the listed price for nearby property quoted by appellant.

The subject parcel was appraised by a qualified appraiser who utilized the market data approach to determine the fair market value. His results are supported by recent sales of similar parcels of land in the immediate area. Appellant has not demonstrated that the appraisal is in error, nor has it submitted any evidence which challenges the correctness of the data. When the current fair market value has been determined in accordance with accepted procedures, the appraisal will not be disturbed in the absence of positive substantive evidence that it is in error. Leon H. Rockwell, 72 IBLA 373 (1983); Abraham Epstein, 24 IBLA 195 (1976); George D. Jackson, 20 IBLA 253 (1975). Appellant has not made any such showing with respect to the fee appraisal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of February 25, 1983, is set aside and the case remanded to BLM for further action consistent herewith with respect to the rental reappraisal, and the decision of December 27, 1982, is affirmed with respect to the fee appraisal.

Gail M. Frazier
Administrative Judge

We concur:

James L. Burski
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

6/ Fair market value is defined as: "[T]he amount in cash, or in terms reasonably equivalent to cash, for which in all probability the right to use the site would be granted by a knowledgeable owner willing but not obligated to grant to a knowledgeable user who desires but is not obligated to so use." Full Circle, Inc., 35 IBLA 325, 333, 85 I.D. 207, 211 (1978).